STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from the Court of Appeals
Judges: Cooper, P.J., and Fort Hood and Borrello, JJ.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant/Cross-Appellee,

v

RANDY R. SMITH,

Defendant-Appellee/Cross-Appellant.
_____/

Supreme Court No. 130245

Court of Appeals No. 256066

Lower Court No. 03-193910-FC

OAKLAND COUNTY PROSECUTING ATTORNEY
Attorney for Plaintiff-Appellant

ROBIN M. LERG (P 40297)
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130245 (41) cross-app

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DEFENDANT'S CROSS-APPLICATION FOR LEAVE TO APPEAL
NOTICE OF HEARING
PROOF OF SERVICE

TP

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STATEMENT OF JURISDICTION AND RELIEF REQUESTED

Defendant-Appellant Randy R. Smith was convicted by an Oakland County Circuit Court jury, the Hon. Edward Sosnick presiding, of second degree murder, MCL 750.317 and felony firearm, MCL 750.227b. He appealed as of right to the Court of Appeals, and a brief on appeal was filed on or about November 23, 2004 raising five issues of error. On December 22, 2005, the Court of Appeals, Cooper, P.J., and Fort Hood and Borrello, JJ, issued an unpublished, per curiam opinion reversing his convictions because the trial court did not instruct the jury on a necessarily included lesser offense that was supported by a rational view of the evidence and ordering a new trial (44a-c).

On December 28, 2005, the prosecution timely filed an *Application for Leave to Appeal* the Court of Appeals decision. Defendant cross-appeals from that portion of the December 22, 2005 decision that did not address his challenge to the sufficiency of the evidence to support his second degree murder conviction in light of its determination that defendant was entitled to a new trial (43e) and various other claims of error which the Court of Appeals decided against him, and asks this Court to vacate his second degree murder and predicate felony firearm convictions or provide other appropriate relief.

The charges stemmed from the shooting death of Ashleigh Moomaw at defendant's home early on December 7, 2003. Moomaw and friend Jaimie Crawford had been invited to spend the evening at defendant's home, and when they arrived, defendant had other guests, including Darren Teed. During the course of the evening, defendant showed Teed a .25 caliber gun that held six shots in the clip and a seventh in

the barrel, and when defendant removed the clip, Teed saw that the gun was loaded. Shortly after, everyone except Moomaw, Crawford and defendant left. Defendant and Moomaw sat together on a couch in the living room. Crawford testified that she saw defendant point a gun in Moomaw's direction, heard him say "say I won't do it," and heard Moomaw say "you're stupid, don't do it, you're gay" or "no, you wouldn't, don't be stupid," in a tone that indicated that Moomaw was not frightened. When Crawford looked away for a split second, she heard a gun go off, then looked to see Moomaw lying motionless on the floor. Defendant told Crawford they had to leave the house, said it was an accident and asked her to tell people that Moomaw had shot herself.

On appeal, defendant challenged the sufficiency of the prosecution's proofs on the second degree murder charge on grounds that the proofs showed that Moomaw's death occurred under circumstances that mitigated it to manslaughter and really showed that he had committed manslaughter under the theory of discharging a firearm intentionally aimed without malice, MCL 750.329. The Court of Appeals did not reach the merits of this issue in light of its reversal:

> As we have determined that defendant is entitled to a new trial, we need not consider his challenge to the sufficiency of the evidence (43f).

For the reasons set forth under Issue 1, this claim is meritorious, and failure to consider this issue will work a material injustice to defendant, because he is entitled to have a ruling on the merits of his claim.

Defendant also argued that he was entitled to be resentenced because the trial court increased the statutory sentencing guidelines range based on facts not proven to the jury beyond a reasonable doubt in violation of *Blakely v Washington,* and if the issue had been forfeited by trial counsel's failure to object, then he received ineffective

assistance of counsel. The Court of Appeals decided this issue against defendant because "[a] majority of the Michigan Supreme Court has decided that *Blakely* does not apply to Michigan's indeterminate sentencing guidelines in which the maximum sentence is set by law," citing both *People v Claypool,* 470 Mich 715, 730 n14 (2004) and *People v Drohan,* 264 Mich App 77, 89 n4 (2004), *lv gtd* 472 Mich 881 (2005) (43f-g). However, at the time the Court of Appeals issued its opinion, *Drohan* had already been argued in this court, so its reliance on its *Drohan* decision and *Claypool* were misplaced. If allowed to stand, the Court of Appeals' decision will work a material injustice to defendant. At the very least, defendant's cross-application must be held in abeyance pending this Court 's decision in *Drohan.*

Defendant also argued that it was reversible error for the trial court to allow the prosecution to elicit evidence of prior shooting incidents because they were inadmissible under MRE 404(b), allowed the prosecution to accentuate their improper purpose during closing argument and increased his sentence. Before trial, the trial court questioned the relevance of the evidence, but allowed it because defendant was asserting that the shooting was an accident. After evaluating the claim under the *VanderVliet* test, the Court of Appeals, citing *People v Golochowicz,* 413 Mich 298, 315-316 (1982), held:

> As defendant alleged his inexperience with firearms resulted in Ms. Moomaw's accidental shooting, contradictory evidence establishing that he intentionally and knowingly shot a gun in the past was relevant and material. As defendant has not established that the prejudicial effect of this evidence substantially outweighed its probative value, the trial court properly granted defendant's motion to elicit testimony (43c).

The Court of Appeals' decision was clearly erroneous because the evidence admitted at did not suggest a familiarity with guns, but instead showed that if defendant had shot before, he must have done so in this instance, and if allowed to stand, will call material

injustice to defendant, especially in light of these incidents caused his statutory sentencing guidelines to increase.

Defendant also argued that the prosecution committed misconduct when it appealed to jurors' sympathy for Moomaw in its opening and closing statements and if the issue was waived by a failure to object, he received ineffective assistance of trial counsel. During its opening statement, the prosecution told jurors that Moomaw had been buried on her 17th birthday where she received a coffin instead of presents, cake and "hugs and kisses" from family and accused defendant of causing "the tragic death of a young girl with a bright future," while in its closing statement, the prosecution argued that Moomaw was now only a memory instead of "a daughter, a granddaughter, a sister, a friend" because of defendant. While acknowledging that these comments were "emotionally charged," the Court of Appeals held that since these comments were "isolated," they did not deprive defendant of a fair trial and since defense counsel "adequately" addressed the comments in his own arguments, there was no ineffective assistance of counsel (43c). This ruling, if allowed to stand, will work a material injustice to defendant.

If this Court grants the prosecution's application for leave to appeal that portion of the Court of Appeals decision reversing defendant's convictions on the instructional issue and ordering a new trial, defendant asks this Court to grant this cross-application for leave to appeal or order other appropriate relief, such as peremptory reversal of his convictions and sentences, remand to the Court of Appeals with instructions to consider the evidence sufficiency issue, or hold this application in abeyance pending its decision in *Drohan*.

STATEMENT OF QUESTION PRESENTED

1. Must defendant-appellant's second degree murder conviction be reversed because the prosecution presented insufficient evidence to prove his guilt beyond a reasonable doubt?

The Court of Appeals did not reach the merits of this issue in light of its reversal on other grounds.

Plaintiff-Appellant/Cross-Appellee would say "No."

Defendant-Appellee/Cross-Appellant says "Yes."

2. Is defendant-appellant is entitled to resentencing because the trial court increased the statutory sentencing guidelines range based on facts that were not proven to a jury beyond a reasonable doubt in violation of *Blakely v Washington*, 542 US ___; 124 S Ct 2531; ___ L Ed 2d ___ (2004), and if this court deems the issue forfeited by trial counsel's failure to object, did defendant-appellant received ineffective assistance of counsel?

The Court of Appeals said "No."

Plaintiff-Appellee would say "No."

Defendant-Appellant says "Yes."

3. Was it reversible error for the trial court to allow introduction of evidence of prior shooting incidents because they were not admissible under MRE 404(b) and their introduction allowed the prosecutor to accentuate the improper evidence during his closing argument and they increased defendant-appellant's sentence?

The Court of Appeals said "No."

Plaintiff-Appellee would say "No."

Defendant-Appellant says "Yes."

4. Did the prosecution's improper appeals to sympathy denied defendant-appellant a fair and impartial trial, and if trial counsel waived the error by failing to object, did he deprived defendant-appellant of effective assistance of counsel?

The Court of Appeals said "No."

Plaintiff-Appellee would say "No."

Defendant-Appellant says "Yes."

STATEMENT OF MATERIAL FACTS AND PROCEEDINGS

Introduction

Defendant-Appellee Randy R. Smith (defendant) was originally charged in the alternative with one count of second degree murder, MCL 750.317, or manslaughter, MCL 750.321, and felony firearm, MCL 750.227b in the shooting death of Ashleigh Moomaw (*Complaint,* lower court file). Following the preliminary examination, the prosecution was successful in adding a second alternative count of manslaughter committed by aiming or pointing a firearm intentionally but without malice, MCL 750.329 (PE 3-4, 65-67, 69). Following a two-day jury trial before Oakland County Circuit Court Judge Edward Sosnick, he was convicted of second degree murder and felony firearm. On May 5, 2004, defendant was sentenced to consecutive terms of 31 to 50 years and two years respectively.

Pretrial Rulings

On February 5, 2004, the prosecution moved to admit evidence of three incidents it claimed were defendant's "other crimes or wrongs" under the authority of MRE 404(b). The first "wrong" was alleged to have occurred in early October, 2003 when defendant pulled out a gun, pointed it at Christina Lauria, said "bet I won't," and put the gun away (2-18-04 3-4). The second "wrong" was alleged to have occurred on November 2, 2003, when defendant pulled out a small handgun, yelled "what's up now bitch, I'll kill you motherfucker," pointed it at Nathan Pellow, with whom he had had an argument at a party, and fired three shots above Pellow's head (2-18-04 4). The third "wrong" was alleged to have occurred in late November, 2003, when defendant walked up to a car occupied by Amanda Trisler and Lauria that was parked in front of his house, pulled out

a pistol, told the girls "look what I got," looked at Trisler, told her he had a bullet with her name on it and pointed it at Trisler (2-18-04 4-5). It argued that the "wrongs" were offered for the "proper purposes" of demonstrating defendant's intent or lack of accident, his knowledge and familiarity of firearms and his knowledge "as it relates to the creation of a very high risk of death knowing that death is the likely result of his actions." (*People's Brief in Support of Motion to Introduce Evidence of Other Acts Pursuant to MRE 404(b),* lower court file; 2-18-04 5). During the motion hearing, the trial court expressed its concern that the evidence was irrelevant and only showed defendant's propensity to commit this offense:

> MR. WIGOD [prosecutor]: I don't think the fact that they're separate – I'm not introducing the evidence to show that he has a pattern of abusing the same victim. I think the desire to introduce the evidence more goes to the fact of the weapon and how he uses the weapon and his knowledge of weapons to show that, one, this was an intentional act –
>
> THE COURT: Well, how is it that other than propensity, that's the problem I'm having.
>
> MR. WIGOD: Okay.
>
> THE COURT: You know with regard to other people, how does that show –
>
> MR. WIGOD: Because it doesn't matter who the victim is, it shows his knowledge and familiarity with firearms.
>
> THE COURT: But how's that relevant in this case?
>
> MR. WIGOD: Because his defense is basically it was an accidental shooting. He did not intend to pull the trigger. He did not intend to kill her. Well, each time he's in possession of these weapons, he has his finger on the trigger, has the weapons pointed at people and, in fact, discharging the weapon, he knows hot to pull the trigger, what weapon – (2-18-04 5-6).

Upon learning from defense counsel that the defense was accident, the trial court found that under those circumstances, the evidence was probative and allowed the evidence (2-18-04 6). Defense counsel asked for a curative instruction at trial (2-18-04 6).

Trial & Sentencing

The charges stemmed from the shooting death of 16-year-old Moomaw on December 7, 2003. Testimony elicited at trial showed that police found a locked door and covered windows when they arrived at 135 W. Madge in Hazel Park, and after forcing their way in, found a younger white woman lying motionless on her left side in a fetal position on the living room floor in a pool of blood with a possible bullet wound over her right eye (4-12-04 33-41). Emergency medical services workers pronounced her dead at the house (4-12-04 54). It was later determined that she died of a gunshot wound that would not have caused instantaneous death from a small caliber bullet that had not been fired a close range that was caused by a homicide (4-13-04 11-18). Toxicology tests showed that she had consumed a small amount of alcohol (4-13-04 15).

When Darrin Teed went to defendant's house to purchase ecstasy from "Blain Bravin"[1] at about 1:00 a.m. on December 7, 2003, "Bravin" opened a kitchen drawer, pulled out a gun Teed later identified as a Browning .22 long rifle, and showed it to him. Moomaw and Crawford arrived at the house at this time. While calls were being made to get the ecstacy, defendant, sitting in the middle of the living room couch, pulled a gun, identified as a .25 caliber semiautomatic, out of his waistband, and showed it to Teed, and told him that the gun held six rounds in the clip and one in the chamber after Teed asked about the gun. Defendant took out the magazine and showed it to Teed. Teed did not see the gun again after defendant put the magazine back into the gun. Jeremy Johnson, who had been trying to secure the ecstacy, announced that he could

[1] It is believed that Teed was referring to Blaine Braybant.

get some ecstasy pills at a party "on Caldonia," so Teed, "Bravin" and Johnson left, borrowing Moomaw's car, while defendant, Moomaw and Crawford remained behind (4-12-04 109-119, 121).

Crawford testified that the original plan was to "hang out" with "Britney Crawford (Britney)" and "Jennifer Edgle (Edgle)" when Moomaw got off of work. At around 10:00 p.m., Moomaw picked up Crawford and headed to defendant's house to retrieve her shoes. They noticed that a car belonging to Christina Lauria, a girl neither one of them got along with, was parked across the street, so Moomaw decided that she did not want to retrieve her shoes. Crawford volunteered, but when she heard defendant's voice respond to her knock on the door, Crawford returned to Moomaw's car, as they had not expected defendant to be there (4-12-04 130-136).

Moomaw drove to a gas station, to call "Britney" and Edgle to finalize their plans, then drove home and "got ready." Moomaw tried to call defendant, but instead, got a "call back" from "Megan Boutache," "another girl she had a problem with." When defendant called Moomaw to invite her over to his house, she was "all for it," but Crawford was not, because she had a "feeling," but they went anyway and told "Britney" and Edgle that they would call from defendant's house when they were ready to "meet up." (4-12-04 136-139).

Moomaw and Crawford brought liquor with them and arrived to find defendant, Johnson, "Blaine"[2] and "a person that I didn't know"[3] present, and almost immediately, Moomaw allowed Johnson and "the one I didn't know" to borrow her car. "Blaine" talked to Moomaw for "less than a minute" and also left. Moomaw went into the kitchen, took a

[2] It is believed that Crawford was referring to Blaine Braybant.
[3] It is believed that Crawford was referring to Teed.

sip of vodka, drank Cherry Coke® and "messed" with defendant's pit bull puppies. Defendant put the dogs "somewhere" and he and Moomaw went into the living room couch, where they talked. From her vantage point near the kitchen sink, Crawford heard defendant say "say I won't, say I won't do it," and looked over to see "like a side view of a gun" that was pointed in Moomaw's direction and had the gun gone off at that time, it would not have hit Moomaw. Crawford heard Moomaw say "you're stupid, don't do it, you're gay." Defendant said "yeah, you're right," but started in again with saying "say I won't." As Crawford walked towards the living room, she saw the gun pointed directly at Moomaw's head and heard defendant say "say I won't," and Moomaw say "no, you wouldn't, don't be stupid." Crawford "glanced" down, heard a gun fire, heard something fall and looked to see defendant stand up and Moomaw motionless on the floor. Crawford initially thought Moomaw had fainted, because she saw nothing indicating that she had been shot. Crawford went to the laundry room, telling herself that it was all a dream and that she would wake up. When she returned to the living room a few seconds later, Crawford saw blood under Moomaw's head and had to kick the dogs to keep them from licking Moomaw's head. Defendant followed Crawford when she returned to the laundry room for a second time, told her "promise you're not going to say anything, swear to God you're not going to tell anybody," and instructed her to say that Moomaw shot herself. Crawford remarked that no one would believe it but agreed to not say anything (4-12-04 140-164).

Defendant then told Crawford that they had to leave, she refused at first, but eventually agreed and waited for defendant. When defendant returned, he appeared to be wiping his hands with a towel. Crawford did not see a gun. Crawford asked

defendant if she could use his cellular phone, planning to either call the police or someone to take her to the police, but defendant said that "Blaine" had it. When they got on the front porch, defendant returned to retrieve some marijuana. The pair "hopped two fences" but Crawford eventually split from defendant, and got a ride to a friend's house and called her mother and police (4-12-04 164-174). Defendant was apprehended in Hamtramck at 10:00 a.m. on December 7, 2003 (4-13-04 39-42).

During cross-examination, Crawford acknowledged telling police that this was not the first time Moomaw had told her that defendant pointed a gun at her and that she honestly did not think defendant would hurt Moomaw. She also told jurors that defendant was careless about the gun. Through instant messaging, she told Michelle Gomez that defendant did not do it on purpose and that it sounded like he was joking (4-12-04 183-199).

Police examined and tested the .25 caliber semi-automatic Raven, model MP25 handgun recovered at 88 W. Madge. It appeared to have no major damage other than from general use. It had a manual safety that indicated "safety" when the gun was in a safe mode and also had an internal safety that prevented the gun from firing if a bullet lodged itself halfway into the chamber. The gun did not fire when purposely dropped on the ground or when tapped on the rear slide with a rubber mallet and only fired when the trigger was pulled, and only with six to seven pounds of pressure. During cross-examination, the gun examiner admitted that waiving a gun without the safety engaged was not prudent (4-12-04 217-222, 239).

Police also analyzed one spent cartridge and one bullet recovered from Moomaw's body, determined that the bullet had been fired by the .25 caliber semi-

automatic Raven, but could not determine with 100 percent certainty that the spent cartridge had been fired from the .25 caliber semi-automatic Raven because there were not enough similar microscopic individualistic characteristics between the recovered cartridge and the test-fired cartridge. However, the cartridge was the same type of ammunition recovered (4-12-04 230-236).

Lauria testified that on Friday, December 6, 2003, she traveled to Bad Axe with defendant, "Megan" and "Blaine," spent the night and returned the next day, when she dropped defendant off at home, went to "Megan's" house, then returned to defendant's house at about 8:00 p.m., where she beeped her car horn and defendant came out, but when she learned that Gomez and "Angel Trout" were there, she left and purchased alcohol with "Megan." They returned after Gomez and "Angel Trout" left and consumed three shots of alcohol and smoked some marijuana, while defendant drank a "couple" of beers and smoked some marijuana. Defendant took a weapon into the bedroom and put it under the mattress when he and Lauria went there to kiss. On a couple of occasions in the past, defendant had pulled out his gun, looked at her and said "say I won't," but she did not see the action as threatening, and in fact, she took it as a joke because "he wouldn't do anything like that." (4-12-04 244-253, 255).

Police searching the house found a plastic bag containing a green, leafy substance they suspected was marijuana on a coffee table (4-12-04 58). A spent .25 caliber shell casing was found between the cushions of the couch (4-12-04 59-61). Ten .22 caliber live rounds were found in an "entertainment center." (4-12-04 62-63). A gold box containing 16 .25 caliber live rounds were found in a bedroom closet (4-12-04 65-68). A black gun case was found under the bed (4-12-04 69). Six .22 caliber live

rounds were found in a drawer in the kitchen (4-12-04 71-72). A .22 short shell casing was found in the garbage in the laundry room (4-12-04 73). On the back deck, two large bags of suspected marijuana were found under the lid of the barbeque grill (4-12-04 75). In an area between a chain link fence and a privacy fence, an unloaded Browning .22 long rifle missing its magazine was found (4-12-04 75-79). Later, police found a.25 caliber semi-automatic pistol with a disengaged safety loaded with five live rounds, $110 in cash and a paper towel in the back yard of 89 W. Madge, five houses east and on the same side of the street as defendant's house (4-12-04 80-92, 98).

Nathan Pellow claimed he had a confrontation with defendant on November 2, 2003 when he went to a house in Madison Heights to pick up his sister from a party, where he "kind of" grabbed him by his coat and threatened to "beat the crap out of him," and defendant responded by "screaming" "oh, you want to fuck with me motherfucker," and firing three gunshots – the first one into the air, the second one "came down a little bit," and third one in some unknown direction before "taking off." Despite this, Pellow did not report this incident to police (4-13-04 21-29).

During closing argument, the prosecutor made inflammatory arguments that appealed to the jurors' sympathy (4-13-04 66). The jury found defendant guilty of the two charged offenses (4-13-04 107-108). At sentencing, the trial court raised defendant's score for OV 13 from 10 to 25 points and denied defendant's challenge to the scoring of OV 19 (ST 5-9). The trial court sentenced defendant to a term of two years for felony firearm that was ordered to be served consecutively to a 31 to 50-year term for second degree murder (ST 21).

Appeal

On June 15, 2004, defendant claimed an appeal from his convictions and sentences. Among the five issues of error he argued in the brief he filed in the Court of Appeals on November 23, 2004 were (1) the prosecution presented insufficient evidence to prove defendant's guilt of second degree murder beyond a reasonable doubt, (2) he was entitled to be resentenced because the trial court increased his statutory sentencing guidelines based on facts not proven to a jury beyond a reasonable doubt in violation of *Blakely v Washington, supra,* and alternatively, received ineffective assistance of counsel if the issue was forfeited by a failure to object, (3) it was reversible error to allow introduction of evidence of prior shooting incidents under MRE 404(b) and (4) the prosecution committed misconduct with improper appeals to sympathy during its opening and closing statements and alternatively, received ineffective assistance of counsel if the issue was forfeited by a failure to object. On December 22, 2004, the Court of Appeals (Cooper, P.J., and Fort Hood and Borrello, JJ.) unanimously reversed defendant's convictions on a fifth issue raised: that he was denied a fair trial and a properly instructed jury because the trial court did not instruct on the necessarily included involuntary manslaughter offense in an unpublished opinion (43d-f).

On December 28, 2005, the prosecution filed an *Application for Leave to Appeal.* Defendant now files this *Cross-Application for Leave to Appeal.*

ARGUMENT

1. DEFENDANT-APPELLANT'S SECOND DEGREE MURDER CONVICTION MUST BE REVERSED BECAUSE THE PROSECUTION PRESENTED INSUFFICIENT EVIDENCE TO PROVE HIS GUILT BEYOND A REASONABLE DOUBT.

Standard of Review & Issue Preservation

Challenges to the sufficiency of the evidence are reviewed *de novo. People v Bowman,* 254 Mich App 142, 151 (2002); *People v Wolfe,* 440 Mich 508, 514 (1992); *United States v Canan,* 48 F3d 954, 962 (CA 6 1995); US Const, Am V; Const 1963, Art 1, §17. The evidence must be reviewed in the light most favorable to the prosecution to determine whether a rationale trier of fact could find that each element of the crime was proved beyond a reasonable doubt. *People v Griffin,* 235 Mich App 27, 31 (1999); *Jackson v Virginia,* 443 US 307

Because the standard of review is *de novo,* there is no preservation requirement. *People v Patterson,* 428 Mich 502, 514 (1987).

Discussion

Although defendant raised this issue in his appeal to the Court of Appeals, the Court of Appeals did not consider it, in light of its reversal on the instructional issue:

> As we have determined that defendant is entitled to a new trial, we need not consider his challenge to the sufficiency of the evidence (43f).

This issue was meritorious, and if this Court grants the prosecution's application for leave to appeal on the instructional issue, it should also grant defendant's application for cross-appeal, or at the very least, remand this case to the Court of Appeals for consideration of this issue.

In his opinion in *People v Dykhouse*, 418 Mich 488, 508-510 (1984), Justice Cavanagh set forth the essential elements of a charge of second degree murder:

> As refined by this Court, the elements of common-law murder are: (1) a death, (2) caused by an act of the defendant, (3) absent circumstances of justification, excuse, or mitigation, (4) done with an intent to kill, an intent to inflict great bodily harm, or an intent to create a very high risk of death with the knowledge that the act probably will cause death or great bodily harm. *People v Hansen,* 368 Mich 344, 350-351; 118 NW2d 422 (1962). Common-law murder, as evolved, is what has come to be known as second-degree murder. (Footnotes omitted).

See also *People v Bailey,* 451 Mich 657, 669 (1996). This definition of the essential elements of a charge of second degree murder have been incorporated into the standard criminal jury instruction for this offense. See CJI 2d, 16.5. Malice aforethought is an essential element of murder. *Maher v People,* 10 Mich 212, 217 (1862); *People v Aaron*, 409 Mich 672, 713-717 (1980). Malice is:

> ...the intention to kill, actual or implied, under circumstances which do not constitute excuse or justification, *or mitigate the degree of the offense to manslaughter* (emphasis added).

Aaron, 734-738 (Ryan, J., concurring). *Mullaney v Wilbur,* 421 US 684 (1975) held:

> ...the Due Process Clause requires the prosecution to prove beyond a reasonable doubt the absence of the heat of passion on sudden provocation when the issue is properly presented in a homicide case. *Id.,* 704.

The evidence presented by the prosecution in its case in chief was legally insufficient to prove beyond a reasonable doubt that the killing did not occur under circumstances that reduced the crime to manslaughter, because the evidence showed that defendant committed manslaughter under the theory of discharging a firearm intentionally aimed without malice resulting in death, MCL 750.329, when he aimed the gun at Moomaw's head, told her "say I won't," and shot. Crawford testified that she saw

defendant aiming a gun at Moomaw's head, heard defendant say "say I won't, say I won't do it," and heard Moomaw say "you're stupid, don't do it, you're gay," and "no, you wouldn't, don't be stupid."(4-12-04 140-164). Crawford testified that Moomaw did not sound as if she was frightened. Lauria testified that on a couple of occasions in the past, defendant had pulled out his gun, looked at her and said "say I won't," but she did not see the action as threatening, and in fact, she took it as a joke because "he wouldn't do anything like that." (4-12-04 244-253, 255). Crawford admitted e-mailing a friend that it sounded like defendant was joking (4-12-04 183-199). This evidence is inconsistent with an intent to kill, an intent to inflict great bodily harm, or an intent to create a very high risk of death with the knowledge that the act probably will cause death or great bodily harm.

Based on the evidence presented in this case, Moomaw's death occurred under circumstances that mitigated it to manslaughter. Because the prosecutor failed to present evidence of each element second degree murder beyond a reasonable doubt, reversal is required.

2. DEFENDANT-APPELLANT IS ENTITLED TO RESENTENCING BECAUSE THE TRIAL COURT INCREASED THE STATUTORY SENTENCING GUIDELINES RANGE BASED ON FACTS THAT WERE NOT PROVEN TO A JURY BEYOND A REASONABLE DOUBT IN VIOLATION OF *BLAKELY V WASHINGTON*, 542 US ___; 124 S CT 2531; ___ L ED 2D ___ (2004), AND IF THIS COURT DEEMS THE ISSUE FORFEITED BY TRIAL COUNSEL'S FAILURE TO OBJECT, THEN DEFENDANT-APPELLANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL.

Standard of Review & Issue Preservation

There was no objection below to the scoring of sentencing guidelines variables based on *Apprendi v New Jersey*, 530 US 466; 120 S Ct 2348; 147 L Ed 2d 435 (2000), so review is for plain error. *People v Carines*, 460 Mich 750 (1999), *People v Kimble,* 470 Mich 305 (2004). The *Carines* plain error test was drawn from the federal plain error test in *United States v Olano*, 507 US 725; 113 S Ct 1770; 123 L Ed 2d 508 (1993): (1) there must be error, (2) it must be clear or obvious, (3) it must have affected the defendant's substantial rights (i.e., affected the outcome of lower court proceedings), and (4) it must have 'seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings.'" *Carines*, 763-764. Whether an error is clear or obvious under the second part of the test is judged by the state of the law on appeal, rather than at the time of trial. *United States v Cotton*, 535 US 625, 632; 122 S Ct 1781; 152 L Ed 2d 860 (2002).

Discussion

With respect to this issue, the Court of Appeals rejected defendant's claim that he was entitled to be resentenced under the authority of *Blakely v Washington,* 542 US ___; 124 S Ct 2531; ___ L Ed 2d ___ (2004) because "[a] majority of the Michigan Supreme Court has decided that *Blakely* does not apply to Michigan's indeterminate

sentencing guidelines in which the maximum sentence is set by law." (43f-g). As this Court knows, it heard arguments in *People v Drohan,* where the issue was whether *Blakely* applies in Michigan, in November, 2005 and that case is still pending a decision. Defendant respectfully requests that this Court hold the case in abeyance pending its decision in *Drohan* for the reasons stated below.

Resentencing is required in this case based on *Blakely, supra*, which applies to all cases currently pending on direct appeal. See *Schriro v Summerlin*, ___ US ___; 124 S Ct 2519; ___ L Ed 2d ___ (2004) (*Ring v Arizona*, 536 US 584 ; 122 S Ct 2428; 153 L Ed 2d 556 (2002) applicable to all cases pending on direct review); *Griffith v Kentucky*, 479 US 314 , 328; 107 S Ct 708; 93 L Ed 2d 649 (1987) (even new procedural rules apply to all cases still pending on direct review); *Blakely,* (O'Connor, J., dissenting) ("Every sentence imposed under such guidelines in cases currently pending on direct appeal is in jeopardy," specifically referencing Michigan's statutory guidelines).

In this case, there was clear error under *Blakely, supra,* and but for that error, defendant would have received a sentence within the proper sentencing guidelines range of 180 to 300 months or life for second degree murder and his sentence of 372 months to 50 years is a departure from the constitutionally permissible range of punishments, which specified a maximum penalty of 300 months to any term of years for second degree murder. MCL 777.61. Even a minimal amount of additional prison time constitutes prejudice. *United States v Glover,* 531 US 198; 121 S Ct 696; 148 L Ed 2d 604 (2001) (construing prejudice standard for ineffective assistance of counsel). As in *Kimble, supra*, prejudice has been shown where a defendant received a sentence in excess of that permitted by the properly scored sentencing guidelines. *Id.* Further, such

errors seriously affect the "fairness, integrity, [and] public reputation of judicial proceedings":

> It is difficult to imagine what could affect the fairness, integrity and public reputation of judicial proceedings more than sending an individual to prison and depriving him of his liberty for a period longer than authorized by the law. *Id.*

If this Court does not reverse for plain error, counsel's failure to object to such an error, without which his client would have presumptively received a lesser sentence, is not reasonable strategy and is constitutionally ineffective. US Const Am VI; Const 1963, Art I, §20; *Strickland v Washington*, 466 US 668, 104 S Ct 2052, 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 302-303 (1994); *Kimble*, *United States v Glover, supra.*

Where further fact-finding is legislatively required before a sentence can be increased, by increasing the guidelines range, departing from the guidelines, or otherwise, a criminal defendant has a right to a jury determination of those facts beyond a reasonable doubt, and those facts must be charged in the *Information* against him. US Const, Ams V, VI, XIV. In defendant's case, the legislatively authorized range of punishment was impermissibly increased because the trial judge scored legislatively imposed sentencing guidelines variables to increase the guidelines range based on facts which were not charged in the *Information* nor determined by a jury beyond a reasonable doubt.

In *Blakely,* the defendant had pled guilty to an offense punishable by no more than ten years in prison. Other statutes limited the range of sentences a judge could impose, but a judge could exceed the "standard range" if "substantial and compelling reasons" justified the increase. For Blakely, that "standard range" was 49 to 53 months,

but the trial judge imposed an exceptional sentence of 90 months after finding that Blakely had acted with "deliberate cruelty." *Blakely.*

Applying the principles set forth in *Apprendi v New Jersey*, 530 US 466; 120 S Ct 2348; 147 L Ed 2d 435 (2000) and its progeny, the Supreme Court found Blakely's sentence to be invalid because the judge increased the penalty for the crime based on facts which had not been submitted to a jury and proven beyond a reasonable doubt. *Blakely*. In doing so, the *Blakely* majority rejected the notion that the "statutory maximum" to which *Apprendi* applied was limited to the absolute maximum specified in the penal statute: "the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings." *Id.* *Blakely* remained consistent with the logic of *Apprendi,* which required jury-proof of all facts which exposed a defendant to "greater or additional punishment" outside "the range prescribed by statute." *Apprendi,* 481, 486. Justice Scalia, writing for the *Blakely* majority, elaborated:

> Whether the judge's authority to impose an enhanced sentence depends on finding a specified fact (as in *Apprendi*), one of several specified facts (as in *Ring [v Arizona*, 536 US 584 ; 122 S Ct 2428; 153 L Ed 2d 556 (2002)]), or any aggravating fact (as here), it remains the case that the jury's verdict alone does not authorize the sentence. The judge acquires that authority only upon finding some additional fact. *Id.*

Justice Scalia further made clear that the requisite finding of "substantial and compelling" reasons did not alter the analysis, because the judge could not make that determination without first finding some facts beyond the elements of the base offense to support it. *Id.*

A sentence is invalid not only when a judge departs upward from a statutory guidelines range, but also when the judge sentences a defendant within a range that

was determined by facts neither admitted nor found by a jury beyond a reasonable doubt. In either case, the judge has impermissibly exceeded the legislatively prescribed range of punishment (i.e., that described by the lowest sentencing grid which can be constructed from the facts necessarily found by the jury). Scoring legislative sentencing guidelines to increase the range of punishment is constitutionally indistinguishable from departing from the correct range, and is only proper if the facts which justify that increase have been found by a jury beyond a reasonable doubt.

Harris v United States, 536 US 545; 122 S Ct 2406; 153 L Ed 2d 524 (2002) does not compel a different result. What *Blakely, Harris*, and *Apprendi* consistently describe as elemental facts, for which jury proof is required, are "those facts setting the outer limits of a sentence, and of the judicial power to impose it. . . ." *Harris,* 544. *Harris,* which held that *McMillan v Pennsylvania*, 477 US 79; 106 S Ct 2411; 91 L Ed 2d 67 (1986) was consistent with *Apprendi*, involved only a mandatory minimum. Where a mandatory minimum is involved, the statutory range has a floor, but no ceiling. Thus, the judge is authorized to impose, or even exceed, the mandatory minimum without any additional fact-finding.

This is not the case in a guidelines state like Michigan, where the judge must not only impose a sentence of at least a certain magnitude, but also must impose one no greater than a certain magnitude, without finding facts which change the range of punishment or constitute substantial and compelling reasons for departure. *Harris* distinguishes mandatory minimums from guidelines-based systems: *Apprendi* does not constrain the imposition of mandatory minimums because "[t]he minimum may be imposed with or without the factual finding; the finding is by definition not 'essential' to

the defendant's punishment." *Harris*, 540. Further, it is difficult to argue, and impossible under binding Michigan precedent, that increasing a sentence's length from 180 months to 300 months or life to 225 months to 375 months or life is anything other than increasing the penalty beyond the statutorily prescribed range. See *Kimble* (describing a five-year departure from the appropriate guidelines range as "sending a person to prison for a term several years in excess of what is permitted by the law"). In Michigan, one of the "outer limits" is set by the penal code (the absolute maximum), the other is set by the sentencing guidelines statutes (the maximum minimum), both of which circumscribe the sentence and both of which legislatively constrain "judicial power to impose" that sentence. *Harris,* 544.

Defendant acknowledges that *People v Claypool,* ___ Mich ___ (2004) held that *Blakely* does not apply to the Michigan sentencing guidelines, however, *In re Cox Estate,* 383 Mich 108 , 117; 174 NW2d 558 (1970), quoting *Chase v American Cartage Co, Inc,* 176 Wis 235, 238 (1922), observed that "[w]hen a court of last resort intentionally takes up, discusses and decides a question germane to, though not necessarily decisive of, the controversy, such decision is not a dictum but is a judicial act of the court which it will thereafter recognize as a binding decision." Webster's Seventh New Collegiate Dictionary defines "germane" as "closely akin" or "having a significant connection." The issue in *Claypool* was whether a trial court could use sentencing entrapment as a factor justifying a downward departure from the sentencing guideline range, therefore, the comments about *Blakely* are dicta, not germane to the issue presented in that case, and therefore not precedentially binding.

Further, *Claypool* misinterprets federal authority. *Claypool* states:

> The Chief Justice argues that the United States Supreme Court's decision in *Blakely v Washington,* 542 US ___; 124 S Ct 2531; 159 L Ed 2d 403 (2004), affects this case. We disagree. *Blakely* concerned the Washington state determinate sentencing system, which allowed a trial judge to elevate the maximum sentence permitted by law on the basis of facts not found by the jury but by the judge. Thus, the trial judge in that case was required to set a fixed sentence imposed within a range determined by guidelines and was able to increase the maximum sentence on the basis of judicial fact-finding. This offended the Sixth Amendment, the United States Supreme Court concluded, because the facts that led to the sentence were not found by the jury *Blakely, supra* at ___, 124 S Ct 2531.
>
> Michigan, in contrast, has an indeterminate sentencing system in which the defendant is given a sentence with a minimum and a maximum. *The maximum is not determined by the trial judge but is set by law. MCL §769.8.* The minimum is based on guidelines ranges as discussed in the present case and in *Babcock, supra.* The trial judge sets the minimum, but can never exceed the maximum (other than in the case of the habitual offender, which we need not consider because *Blakely* specifically excludes the fact of a previous conviction from its holding). Accordingly, the Michigan system is unaffected by the holding in *Blakely* that was designed to protect the defendant from a higher sentence based on facts not found by the jury in violation of the Sixth Amendment (emphasis added).

Claypool makes the same fundamental error that many courts made when *Apprendi* was first announced – that *Apprendi's* "prescribed statutory maximum" means the maximum sentence that may be imposed by statute. As *Booker* clearly explains, the Supreme Court never intended to limit *Apprendi* to cases where the sentence imposed exceeded the statutory maximum sentence which could be imposed for the offense originally charged:

> Our precedents make clear, however, that the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant. *See Ring, supra,* at 602, 122 S Ct 2428 ("'the maximum he would receive if punished according to the facts reflected in the jury verdict alone.'" (*quoting Apprendi, supra,* at 483, 120 S Ct 2348)); *Harris v United States,* 536 US 545, 563, 122 S Ct 2406; 153 L Ed 2d 524 (2002) (plurality opinion) (same); cf. *Apprendi, supra,* at 488, 120 S Ct 2348 (facts admitted by the defendant). *In other words, the relevant 'statutory*

> *maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings.* When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts 'which the law makes essential to the punishment," *Bishop, supra,* §87 at 55, and the judge exceeds his proper authority.

Booker, slip op at 8 [citations omitted] (emphasis added).

Claypool also ignores the simple truth that the sentencing guideline system ruled to be unconstitutional by *Blakely* is virtually identical to Michigan's statutory sentencing guidelines.

1. The guidelines' goal is to constrain judicial discretion.

The Michigan guidelines represent a legislative decision to constrain the sentencing discretion traditionally granted to trial courts. See *Booker,* 125 S Ct 749-750 (stating that the common "premise" of both the Washington state and federal sentencing systems was "that the relevant sentencing rules are mandatory and impose binding requirements on all sentencing judges"). These guidelines were specifically intended to hem in traditional judicial sentencing discretion and advance systemic sentencing goals.

> [B]efore the 1999 effective date of the legislative sentencing guidelines, the Legislature provided sentencing discretion that in many instances was virtually without limit... In M.C.L. Sec. 769.34, the Legislature plainly implemented a comprehensive sentencing reform. The evident purposes included reduction of sentencing disparity, elimination of certain inappropriate sentencing considerations, acceptance of this Court's *Tanner* rule, encouragement of the use of sanctions other than incarceration in the state prison system, and resolution of a potential conflict in the law. *People v Garza,* 469 Mich 431 , 434-35, 670 NW2d 662 (2003) (footnotes and citations omitted).

See also 1994 PA 445 (forming Michigan sentencing commission and stating goals for legislative guidelines); *cf.* Wash Rev Code Ann §9.94A.010 (stating that the goals of the sentencing system at issue in *Blakely* was to structure sentencing discretion to ensure

proportional sentences and reduce disparity, among other things). The guidelines reflect these legislative priorities, constrain judicial discretion and reduce disparity in a number of ways. For example, grouping felony offenses by the seriousness of the offense (from second degree murder and offense Classes A - H), and specifying a separate sentencing grid for each Class of offenses provides that a more serious offense will be given a higher punishment range. See, *e.g.*, MCL 777.11 *et. seq.* (listing the felonies that are subject to the guidelines and the Class for each felony); MCL 777.61 *et. seq.* (providing for sentencing grids for each Class of offenses); see also Sheila Robertson Deming, *Michigan's Sentencing Guidelines*, 79 Mich B J 652, 653-54 (2000).

2. The guidelines require the court to make factual findings on severity of the offense.

Further constraining judicial discretion and advancing consistent sentencing, the Michigan legislature chose specific additional facts that are relevant to the sentence given to an offender, and determined that each of these facts corresponded to an increase in either the severity of the offense or the blameworthiness of the offender. See MCL 777.31 *et. seq.* (offense variables), MCL 777.50 *et. seq.* (prior record variables). With respect to offense variables, the guidelines represent a statutory determination that these facts, which must be evaluated, are relevant to the severity of the actual offense committed. For example, a persons convicted of assault that inflicts serious or aggravated injury, MCL 750.81a(1) faces a more serious penalty than a person simply convicted of assault, MCL 750.81(1). Similarly, the guidelines represent a legislative determination that a person convicted of felonious assault that causes "serious psychological injury," as opposed to felonious assault that does not, has

committed a more serious offense. See MCL 777.34(1)(a)&(b) (offense variable "degree of psychological injury to a victim"); MCL 750.82 (felonious assault); *cf. Jones v United States,* 526 US 227, 119 S Ct 1215 (1999) (finding that provisions of federal statute that set higher penalties for offense when it resulted in serious bodily injury or death must be submitted to a jury and proven beyond a reasonable doubt).

3. The guidelines link judicial fact-finding with an increase in penalty.

In addition to enumerating facts that increase the severity of an offense, the legislature provided, through the statutory guidelines and corresponding grids, that each of these facts corresponded to a specific, and finite, increase in the sentence the offender is to be given. MCL 777.61 *et. seq.* This determination of the relevant facts and the accompanying increase in sentence is a function that, in a traditional indeterminate sentencing system, was reserved for the trial court's discretion.

Like the guidelines examined in *Blakely* and *Booker*, the Michigan legislative guidelines were enacted to cabin this judicial discretion and provide for consistent sentencing across the state. Further, Michigan, like Washington State and the federal government, chose to limit this discretion, in part, through a legislative determination that specific facts were relevant to the offender's blameworthiness by statutorily tying these factual findings to increases in punishment. See, e.g., *Booker*, 125 S Ct at 746-747.

4. The guidelines are mandatory.

In addition to requiring judicial fact-finding, the guidelines largely mandate the sentencing range available to a defendant. The trial court must evaluate whether or not each fact is present using a lesser standard than beyond a reasonable doubt. *Cf.*

People v Ratkov, 201 Mich App 123, 125-126 (1993) (stating preponderance of the evidence standard under judicial guidelines); MCL 750.81b (requiring findings by a preponderance for an enhanced sentence). If the court determines that a fact is present, the court must add the correspondent number of enhancement points.

Once the court has made factual findings, it "shall" impose a sentence "within the appropriate sentence range." MCL 769.34(2). This sentence is the minimum sentence that the offender must serve. See, *e.g.,* MCL 769.8; MCL 769.10. Unlike the prior judicial guidelines, the statutory guidelines have the effect of law. *People v Hegwood,* 465 Mich 432 (2001). Therefore, generally, the sentence imposed by the court will not be less severe than the sentence provided for by the legislative guidelines. The judicial findings of fact will increase the sentence dictated by the guidelines grid.

The legislature further constrained traditional judicial sentencing discretion by making a mandatory determination about offenses that merit prison sentences -- and those that do not -- by designation of intermediate sanction cells within the guideline grids. The legislature directed trial courts to impose these finite jail terms and other non-prison sentences if the offense and the offender fell within certain parameters; so that the high end of the guidelines was less than 18 months. MCL 769.34(4)(a). Thus, in cases in which the trial court, before the guidelines, could make a discretionary "judgment call" about the appropriateness of imprisonment, the legislature now largely makes this decision automatic under the guidelines. This determination that some offenses would result in a finite jail term or a lesser non-incarcerative alternative was made from the beginning of the development of the legislative guidelines. See 1994 PA 445. This statutory determination is based, at least partially, on systemic concerns

about proportionality and conservation of state prison resources for more deserving offenders. *Id.*

Trial courts have some discretion under the guidelines, but it is "limited to those circumstances in which [ ] a departure is allowed by the Legislature." *People v Babcock,* 469 Mich 247, 255 (2003) (quoting *Hegwood,* 439). The court may depart from the legislated guidelines only if "substantial and compelling" reasons are present and those reasons are articulated on the record. MCL 769.34(3). *Id.; Babcock,* 256. The appellate courts review this departure for an abuse of discretion. *Babcock,* 265-266. Therefore, while trial courts have some discretion, it is constrained by the limits laid out by the legislature and by appellate review. See *Hegwood*, 437; *People v Milbourn,* 435 Mich 630, 651-653 (1990).

Further, this minimal discretion does not render the guidelines constitutional. *Booker* noted that if the federal sentencing guidelines were mere recommendations, "their use would not implicate the Sixth Amendment." *Booker*, 750. However, the federal guidelines violated the Sixth Amendment, in part, because Congress chose to make them binding on the district court judges. *Id.*, 749-750. Similarly, trial courts in Washington state, like trial courts in Michigan, could depart from the otherwise binding guidelines only under clearly delineated and carefully reviewed circumstances. *Blakely,* 124 S Ct, 2535. The ability of the Michigan courts to depart from our guidelines for "substantial and compelling reasons," subject to appellate review, does not distinguish Michigan's guidelines from either the federal guidelines or Washington state guidelines. See *Booker,* 125 S Ct, 750; *Blakely*, 2535 (noting trial court's ability to depart for

"substantial and compelling reasons" under Washington guidelines). In fact, it highlights their similarity.

Furthermore, the continuing viability of *Claypool* is in question in light of the pending *People v Drohan,* 264 Mich App 77, *lv gtd* 472 Mich 881 (2005), arguein November, 2005, where the sole issue to be decided is:

> ... whether *Blakely v Washington*, 542 US __; 124 S Ct 2531; 159 L Ed 2d 403 (2004), and *United States v Booker*, 543 US __; 125 S Ct 738; 160 L Ed 2d 621 (2005), apply to Michigan's sentencing scheme. See *People v Claypool*, 470 Mich 715, 730; 684 NW 2d 278 n 14 (2004). *Id.*

In this case, defendant did not dispute the scoring of 15 points under OV 5 but did dispute the scoring of OV 13, originally scored at 10 points, but not on *Blakely* grounds. Following arguments on the scoring of OV 13, the trial court increased the score to 25 points, accepting the prosecutor's arguments that the "404(b)" incidents could be factored in. Scoring these offense variables required findings of fact that were not necessarily made by the jury at trial. The facts necessary to score 15 points under OV 5 include a showing that "[s]erious psychological injury requiring professional treatment occurred to a victim's family member." MCL 777.35(1)(a). The jury was never instructed on this. Likewise, 25 points under OV 13 include a showing that [t]he offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person." MCL 777.43(1)(b). The jury was specifically instructed that they could consider the evidence only to determine whether defendant did not act by mistake or by accident or that he had knowledge of firearms, and that they could not consider whether he was guilty of that conduct (4-13-04 29-30). Because the facts set forth in the relevant variables were not, under *Apprendi* and *Blakely*, tried to a jury and found

beyond a reasonable doubt, they cannot be used to score the statutory guidelines so as to increase the sentencing grid.

Cotton, supra, specifically addressed as plain error a failure to preserve error under *Apprendi.* Although the court found there was no plain error on the facts before it, the basis for that holding was that the evidence for the disputed element was "'overwhelming' and 'essentially uncontroverted.' " *Cotton,* 633. That cannot be said here. Defendant disputed the allegations and maintained that the incident was an accident. In no way did he, or does he, concede that he caused psychological injury, or that he engaged in a pattern of felonious criminal activity. Nor was the evidence overwhelming on these points - to the contrary, the evidence of his guilt was arguably insufficient as a matter of law. Even assuming the evidence was legally sufficient, the trial boiled down to an assessment of the credibility of the eyewitness, who told everyone the incident was an accident and only changed her story when the authorities and the media became involved.

The basis of the *Apprendi* rule, extended by *Blakely*, is that what superficially appear to be mere "sentencing factors" used to enhance a sentence are actually elements of an aggravated crime. *Apprendi,* 477-478, 484 n 10; *Harris*, 534. As an aggravated offense is a necessarily included offense of the base offense, the double jeopardy clause prohibits retrial on the greater offense following conviction of the lesser. US Const, Am V; Const 1963, Art I, §15; *Brown v Ohio*, 432 US 161, 168; 97 S Ct 2221; 53 L Ed 2d 187 (1977). The only proper resolution is to resentence defendant within the lowest grid supported by the facts necessarily found by the jury. In this case, neither OV 5 nor OV 13 could have been scored based on the jury's verdict. Thus, the proper range

for second degree murder is 162 to 270 months or life. MCL 777.61 (grid C-II for Second Degree Murder). As his sentences of 372 months to 50 years constitute upward departures, defendant must be resentenced to terms of incarceration within the correct C-II range.

3. IT WAS REVERSIBLE ERROR FOR THE TRIAL COURT TO ALLOW INTRODUCTION OF EVIDENCE OF PRIOR SHOOTING INCIDENTS BECAUSE THEY WERE NOT ADMISSIBLE UNDER MRE 404(B) AND THEIR INTRODUCTION ALLOWED THE PROSECUTOR TO ACCENTUATE THE IMPROPER EVIDENCE DURING HIS CLOSING ARGUMENT AND THEY INCREASED DEFENDANT-APPELLANT'S SENTENCE.

Standard of Review & Issue Preservation

The decision whether to admit prior acts evidence under MRE 404(b) is reviewed for an abuse of discretion. *People v Crawford*, 458 Mich 376, 383 (1998). However, under the three-part standard of review articulated by the United States Court of Appeals for the Sixth Circuit the trial court's finding whether the conduct did in fact occur is reviewed for clear error, the decision whether the evidence was admissible for a proper purpose under 404(b) is reviewed de novo, and the decision whether the probative value of the evidence is substantially outweighed by its prejudicial effect is reviewed for an abuse of discretion. *United States v Latouf*, 132 F3d 320, 328 (CA 6, 1997); *United States v Merriweather*, 78 F3d 1070, 1074 (CA 6, 1996); *United States v Johnson*, 27 F3d 1186, 1190 (CA 6, 1994).

This issue was preserved by a defense objection. (T I 3-9).

Discussion

Before trial, the prosecution moved to admit evidence of defendant's "other crimes or wrongs" under the authority of MRE 404(b): (1) an incident that allegedly

happened in early October, 2003 when defendant pulled out a gun, pointed it at Christina Lauria, said "bet I won't," and put the gun away, (2) an incident that allegedly happened on November 2, 2003, when defendant pulled out a small handgun, yelled "what's up now bitch, I'll kill you motherfucker," pointed it at Nathan Pellow, with whom he had had an argument at a party, and fired three shots above Pellow's head and (3) an incident that allegedly in late November, 2003, when defendant walked up to a car occupied by Amanda Trisler and Lauria, pulled out a pistol, told the girls "look what I got," looked at Trisler, told her he had a bullet with her name on it and pointed it at Trisler (2-18-04 3-5). It argued that the acts were offered for the "proper purposes" of demonstrating defendant's intent or lack of accident, his knowledge and familiarity of firearms and his knowledge "as it relates to the creation of a very high risk of death knowing that death is the likely result of his actions." (*People's Brief in Support of Motion to Introduce Evidence of Other Acts Pursuant to MRE 404(b),* lower court file; 2-18-04 5). Upon learning from defense counsel that the defense was accident, the trial court found that under those circumstances, the evidence was probative and allowed the evidence (2-18-04 6).

During the trial, the jury only heard from Pellow[4], who told jurors that when he went to a house in Madison Heights to pick up his sister from a party on November 2, 2003, he had a confrontation with defendant:

> I kind of grabbed him by his coat, gripped him up, whatever, said, hey, you've got a problem with me this and that, blah, blah, blah, you know, I was like – basically I just said I'd beat the crap out of you whatever and I just pushed him and walked away this way (4-13-04 13-14).

[4] The defense elicited Lauria's incident during her cross-examination (4-12-04 255) and the incident where defendant allegedly told Trisler that a bullet had her name on it did not come out at trial.

Pellow then heard someone scream "oh, you want to fuck with me motherfucker," and turned around immediately before defendant fired three gunshots. The first was into the air. The second one "came down a little bit." Pellow was not sure about the direction of the third shot. After firing the shots, defendant "took off." Pellow admitted that he did not report this incident to police (4-13-04 21-29). After Pellow's direct examination, the trial court instructed the jury that Pellow's testimony could only be used to consider whether it tended to show that defendant acted purposely or that he had a knowledge or familiarity with firearms, and not to show that defendant was a bad person likely to commit crimes (4-13-04 30).

In his closing, the prosecution argued that since defendant shot a gun at Pellow, he must have shot one at Moomaw:

> And it's not as if he's a novice with handling those [guns]. He knows enough about guns to be pointing them at people. He pointed it a (sic) Christina Lauria before. He's even shot a gun before (4-13-04 74).

The prosecution continued with this theme during rebuttal:

> Jaimie (sic) Crawford said that she thought it was an accident or he didn't do it on purpose. She says, yeah. And you know what, it's not up to Jaimie Crawford to determine what happened or whether his acts were – It's up to all of you. It's your decision. And Jaimie Crawford didn't have all of the additional evidence that you all have. Jaimie Crawford had no idea that the Defendant had fired this gun, fired a gun before (4-13-04 95).

The evidence and argument had the improper purpose and effect of allowing the jury to conclude that defendant was a bad man with the propensity to shoot people with guns. With the use of this evidence and argument, the jury was able to convict defendant, not based on proof beyond a reasonable doubt that he committed the charged offenses, but rather, based upon an impermissible inference that he must be guilty because he was a bad man who had done bad things in the past.

A defendant's due process right to a fair trial can be denied by improper evidentiary rulings. See US Const, Ams V, XIV; Const 1963, Art 1, §20; *Walker v Engle,* 703 F2d 959, 962-63 (CA 6, 1983). MRE 404(b), virtually identical to Federal Rule of Evidence 404(b), governs admission of evidence concerning "other crimes, wrongs, or acts:"

> (1) Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.
>
> (2) The prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial and the rationale, whether or not mentioned in (b)(1), for admitting the evidence.

"Relevant evidence" is defined by MRE 401 as 'evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." However, not all logically relevant evidence is legally relevant, and even if relevant, evidence may be excluded if "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." MRE 403.

Evidence that an accused has committed other offenses is generally inadmissible because of the inherent danger that the trier of fact will convict because it is persuaded that the defendant is a bad person, instead of on the basis of an objective assessment of the evidence. *People v Dermartzex*, 390 Mich 410 (1973). Such evidence creates the danger that the jury will find the commission of the charged crime more likely because it

concludes that the defendant has a propensity to commit such crimes. This inference is absolutely forbidden: "There can never be a direct inference from an act of former conduct to the act charged ...it is in no degree probable that he would do it again." 1 Wigmore, Evidence §192 (3rd Ed. 1940). There are exceptions to the rule excluding prior bad acts evidence, "but these exceptions are narrowly construed and the trial court must always determine whether the danger of unfair prejudice to the defendant substantially outweighs the probative value of the evidence sought to be introduced." *People v James Robinson*, 417 Mich 661 (1983); MRE 403.

Two concerns are expressed in permitting such evidence: (1) the jury may convict a "bad person" who deserves to be punished not because he is guilty of the crime charged but because of his prior or subsequent misdeeds; and (2) the jury will infer that because the accused committed other crimes, he probably committed the crime charged. *United States v Phillips*, 599 F2d 134, 136 (CA 6, 1979). The guilt or innocence of the accused must be established by evidence relevant to the particular offense being tried, not by showing that the defendant has engaged in other acts of wrong doing. 1A J. Wigmore, Wigmore on Evidence, §58.2, 1212-1213 (3d Ed Tiller rev 1983).

These principles were affirmed *People v VanderVliet,* 444 Mich 52 (1993), which based its holding on *Huddleston v United States,* 485 US 681; 108 S Ct 1496; 99 L Ed 2d 771 (1988). *VanderVliet* held that evidence of a defendant's other bad acts is admissible only if: (1) it is offered for a proper purpose under MRE 404(b); (2) it is relevant under MRE 402; and (3) its probative value is not substantially outweighed by unfair prejudice. Evidence of other bad acts is always prejudicial because it diverts the

jury's attention away from the question of the defendant's responsibility for the crime charged to focus on the improper issue of his prior act. *Id.,* 63.

This principle of exclusion was reiterated by *Crawford, supra*, where the defendant had been convicted of possession with intent to deliver cocaine found in his car, and the trial court admitted evidence of his prior delivery convictions to show "his knowledge of the presence of cocaine and his intent to deliver it." *Id.*, 381. The Supreme Court reversed the conviction, finding that the stated purpose was not relevant or material to the issue in the case, and was nothing more than improper character or propensity evidence. The Court held:

> The character evidence prohibition is deeply rooted in our jurisprudence. Far from being a mere technicality, the rule `reflects and gives meaning to the central precept of our system of justice, the presumption of innocence... Underlying the rule is the fear that a jury will convict the defendant inferentially on the basis of his bad character rather then because he is guilty beyond a reasonable doubt of the crime charged. *Id.,* 384.

Crawford's prior convictions were irrelevant because they did not establish an inference, other than the improper character inference, that was probative of the ultimate issue in the case - the defendant's knowledge of the presence of the cocaine in his car and his intent to deliver it. *Id.,* 392. Moreover, they were inadmissible under MRE 403:

> ...we cannot escape the conclusion that the most powerful, if not the only, inference that the jury was likely to make from the prior convictions is the forbidden one: that because the defendant was convicted of selling cocaine in 1988, he must be guilty here. *Id.*, 398-399.

The inadmissibility of the challenged evidence in this case is glaring in light of *Crawford.* Here, the defense argued that the evidence would be more prejudicial than probative, and that it was being offered for the forbidden purpose of showing defendant had a propensity to shoot off guns at will (2-18-04 3). Even though the trial court

questioned the relevance of the evidence, it ruled that because the defense was accident, the prosecutor could introduce the incidents to show that defendant had knowledge of firearms (2-18-04 6).

The prior incident involving Pellow was totally irrelevant and not dispositive of any issue in this case, was more prejudicial than probative, and was offered for the forbidden purpose of convincing the jury that defendant was guilty of Moomaw's death because he had a propensity toward the instant behavior. Pellow testified that after an altercation, he turned around to find defendant aiming a gun and shooting into the air. That evidence did not show a "familiarity" with guns. All it tended to show was that defendant could purposely shoot off a gun – the forbidden inference in this case. Contrast Pellow's testimony with Teed's, who claimed defendant said that the gun contained six rounds in the clip and one in the chamber and "popped" out the clip – evidence that *might* show a "familiarity" with guns (4-12-04 116-118). The probative value of Pellow's testimony with respect to defendant's familiarity with guns was miniscule at best, but in contrast, the prejudice was substantial, because it exposed the jury to irrelevant evidence that encouraged them to infer that defendant was a person of bad character, who had a propensity to shoot firearms at people.

Because the evidence did not suggest that defendant was familiar with guns, clearly, the prosecutor took the forbidden step in introducing it, in order to encourage the jury to view defendant as "bad man." However, even if the evidence met the relevancy threshold under 404(b), it was still inadmissible under MRE 403, because testimony that defendant shot at someone was powerfully prejudicial in light of the facts of this case.

There is no doubt that the prosecution's true purpose for introducing the evidence was to show that defendant was a bad person and not to show a "familiarity" with firearms or any of its other alleged purposes, because when the defense elicited from Crawford that this apparently was not the first time defendant had pointed a gun at Moomaw, the prosecutor jumped at the chance to show that defendant had fired a gun on another occasion not mentioned its 404(b) notice:

> Q: And you mentioned that this was not the first time that the Defendant fired a gun?
> A: Yes.
> Q: Ashley has expressed to you that he fired a gun before, right?
> A: Out her car window, yes.
> Q: And what were the circumstances?
> MR. CATALDO: Your Honor, I'm going to object to ...
> THE COURT: You're getting into hearsay.
> MR. CATALDO: -- hearsay at this point.
> MR. WIGOD: He brings it up, though, Your Honor.
> MR. CATALDO: I didn't open up that door.
> THE COURT: I know, but –
> MR. WIGOD: You certainly did open up that door.
> THE COURT: He has a hearsay objection. You're going to ask her to testify what someone else told her who's not here and not under oath. Therefore, I sustain the objection (4-12-04 201-202).

That did not stop the prosecutor, however:

> Q: Jaimie, after an incident where the Defendant had fired the weapon before –
> MR. CATALDO: You know, I –
> THE COURT: I've already sustained the objection. Please don't bring it up again (4-12-04 202).

Nonplussed, the prosecutor ignored the ruling, which brought this rebuke:

> Q: When, prior to this incident, did she express to you that she was afraid of guns?
> A: The same day that it happened. Not the day of the shooting. But the time with before that she had seen him with it. She had called me that night. It was around 12:30 and I was sleeping and she woke me up.
> Q: And she told you something?
> A: That she had told me that he had fired out her window.

MR. CATALDO: Again, Your Honor –
MR. WIGOD: -- at this point in time –
MR. CATALDO: Let me finish my objection please.
THE COURT: Hold on. Slow down everybody. Number one, I sustained the objection. I'm going to direct you not to bring it up again. Okay. Please disregard the answer. It's hearsay and it's not admissible.
MR. WIGOD: I'd like to direct the Court to Michigan Rule of Evidence 803 –
THE COURT: Fine.
MR. WIGOD: -- which indicates – then existing emotional condition –
THE COURT: We're not dealing with – you made a point to the prosecutor that what we're dealing with is what happened on that particular evening. Okay. We're not going to be trying that other matter. Therefore, my – the objection is sustained (4-12-04 202-203).

Propensity evidence is condemned as harmful for three central and crucial reasons. First, there is a danger that the fact finder may not separate the proper purpose from the improper one. *United States v Merriweather,* 1077; *People v Smith,* 211 Mich App 233, 234-235 (1995) (reversing because of the injection of polygraph test results into evidence at a bench trial this Court noted that the judge's findings established that he was aware of the issues in the case and applied the law correctly except on the polygraph issue). Second, the fear exists that jurors might engage in preventive detention. *Old Chief v United States,* 519 US 172, 180; 117 S Ct 644; 136 L Ed 2d 574 (1997) (stating that another danger of this kind of evidence is "generalizing a defendant's bad act into bad character and taking that as raising the odds that he did the later bad act now charged or, worse, as calling for preventive conviction even if he should be innocent momentarily."). Third, propensity evidence permits conviction only because the defendant is an "unsavory" character. *People v Ullah*, 216 Mich App 669, 676 (1996). Application of these principles lead to the conclusion that the admission of Pellow's testimony was reversible error. A careful review of the record reveals that the

objected to evidence was "character evidence . . . disguised as something else." *Crawford,* 388. Its relevance and probity was marginal at best. It was clearly propensity evidence designed to unfairly prejudice defendant in what was an emotional, high profile case. The other acts evidence in this case failed to meet the 404(b) test for admissibility, so defendant's convictions must be reversed.

The error also was not harmless, because the 404(b) acts formed the basis for the trial court's increasing defendant's score under Offense Variable 13 from 10 points to 25 points:

> MR. CATALDO: Okay. Offense variable 13 is the continuing pattern of criminal behavior, and the 10 point variable as the offense was part of the felonious criminal activity involving a combination of three or more crimes against a person or property. Obviously, the homicide of which he is convicted is involved. They need to find two more felonies. My first argument is that the two being used by the Probation Department are juvenile felonies. I see nothing in the law that indicates that juvenile offenses are calculated and included under OV13. Second point I would make, Your Honor, is that if we're looking at the dates of the felonies that are going to be used, the first felony is -- (inaudible due to coughing) -- of 1998. This offense occurred on December 3 of 2003. That's beyond the 5-year period. Second felony that they would use would be home invasion second degree. That one occurred on November 23 of 1998. This on December 3. Again, outside the 5-year period, Your Honor. And then the third one that they're using is December 5 of the year 2000, which would qualify. We have two not three. The 10 points should eliminated.
>
> THE COURT: All right. Mr. Wigod?
>
> MR. WIGOD: Your Honor, with regard to OV13, I likewise agree that it's improperly scored. However, it's my belief that the proper scoring is 25 points as opposed to 10 points.
>
> THE COURT: And tell me why.
>
> MR. WIGOD: Your Honor, the OV variable in the case for determining the appropriate points under the variable all crimes within a 5-year period, including the sentencing offense, shall be counted, regardless of whether the offense resulted in a conviction. Clearly, the second degree murder charge counts as one, and there were two incidences presented at trial, via 404B witnesses, that the Defendant committed two prior felonious assaults.
>
> THE COURT: No, but don't they have to be convictions?

MR. WIGOD: No, Your Honor. Number 1 indicates shall be counted regardless of whether the offense resulted in a conviction.

THE COURT: Okay. All right.

MR. WIGOD: So, those two incidents, *one with Nathan Pellow and one with Christina Lauria.*

THE COURT: The probation position.

PROBATION: Yes, Your Honor. When those were scored, Probation Department does not have access to the testimony at trial. So, we were not aware of those two other instances.

THE COURT: Okay. I, in this case, agree with the Prosecutor. I think based upon the testimony that I heard, I'll score that 25. Okay. Next (ST 5-7, emphasis added)?

If the evidence had been ruled inadmissible, there would have been no basis for scoring the variable, because, as defendant pointed out, two of his prior felonies were outside the five-year window, MCL 777.43(2)(a), leaving just one prior felony conviction in 2000, justifying a score of zero points. If OV 13 had been scored at zero points, defendant's minimum range would have dropped from 225 months to 375 months or life (C-III) to 180 to 300 months or life (C-II) making his 372-month minimum sentence an upward departure from those guidelines with no articulation of substantial and compelling reasons or that the guidelines gave certain aspects of this case disproportionately low weight.

Defendant is entitled to a new trial.

4. THE PROSECUTION'S IMPROPER APPEALS TO SYMPATHY DENIED DEFENDANT-APPELLANT A FAIR AND IMPARTIAL TRIAL. IF TRIAL COUNSEL WAIVED THE ERROR BY FAILING TO OBJECT, HE DEPRIVED DEFENDANT-APPELLANT OF EFFECTIVE ASSISTANCE OF COUNSEL.

Standard of Review & Issue Preservation

Prosecutorial misconduct is reviewed *de novo* on a case by case basis. *People v Bahoda,* 448 Mich 261 (1995); *People v Watson,* 245 Mich App 572, 586 (2001). This court examines the record and evaluates the prosecution's remarks in context. *Watson.* The test for prosecutorial misconduct is whether the defendant was deprived of a fair and impartial trial. *Watson, People v McElhaney,* 215 Mich App 269, 283 (1996).

The defense did not object to any of the prosecutor's arguments, however, this court can review unpreserved claims if an objection would not have cured the error or where a failure to review the issue would result in a miscarriage of justice. *People v Callon,* 256 Mich App 312, 329 (2003), citing *People v Stanaway,* 446 Mich 643, 687 (1994). Unpreserved claims of prosecutorial misconduct are reviewed for plain error that affected substantial rights. *People v Carines,* 460 Mich 750, 774 (1999). Reversal is warranted only when plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Callon,* 329.

Discussion

Prosecutorial misconduct is to be abhorred, and appellate courts do not hesitate to reverse a conviction where prejudicial and inflammatory remarks are interjected without any justification except to arouse prejudice. "[I]t may arouse the prejudice of jurors against a defendant and, hence, lead to a decision based on prejudice rather than

on the guilt or innocence of the accused." *Bahoda,* 266 (footnote omitted). A prosecutor's duty is to seek justice, not merely to convict. *People v Farrar,* 36 Mich App 294, 299 (1971); *Berger v United States,* 295 US 78, 88; 55 S Ct 629; 79 L Ed 1314 (1935). The prosecutor's conduct here went beyond the bounds of propriety, and the errors individually and/or collectively denied defendant his due process right to a fair trial. US Const, Ams V, XIV; Const 1963, Art 1, §17; *Donnelly v DeChristoforo,* 416 US 637, 639; 94 S Ct 1868; 40 L Ed 2d 431 (1974); *People v Bairefoot,* 117 Mich App 225, 232 (1982).

Appeals to sympathy

The prosecutor began appealing to the jurors' sympathy for Moomaw with the very first sentence of his opening statement:

> Most teenage girls spend their birthday celebrating with friends and family. They go to a party, go out to dinner or to some social event. On Ashley (sic) Moomaw's 17th birthday, she was with friends and family and loved ones. But unlike most teenage girls, for Ashley Moomaw, there were no presents, there wasn't no cake (sic), there were no hugs and kisses from her family members. Instead, for Ashley Moomaw's 17th birthday, she received a casket, funeral service and burial (4-12-04 5-6).

Later, the prosecutor told jurors that at the end of the case, they would know "that the Defendant caused the tragic death of a young girl with a bright future." (4-12-04 12). In his closing statement, he asked jurors to not forget that Moomaw was "a daughter, a granddaughter, a sister, a friend. She was a lot of things to many people. And because of this Defendant, she's just a memory now." (4-13-04 66).

Prosecutors must refrain from appealing to jurors' sympathies of the complainants. *United States v Deloach,* 504 F2d 185, 193 (CADC, 1974), *People v Dalessandro,* 165 Mich App 569, 581 (1988), *People v Kent,* 157 Mich App 780, 794

(1987). Sympathy appeals are inconsistent with the dignity of government. *Deloach.* Even where the prosecutor does not specifically state that jurors should sympathize with the complainant, any statement that is obviously intended to elicit that emotional response is improper. It was error for the prosecutor to argue that the jurors should grant the victim vengeance, *Kent, supra,* or that the victim has been "shot down like a dog in the street." *Deloach, supra.* The prosecution's comments are the kind of sympathy appeals which have been expressly condemned and because they exacerbated an already emotional trial, deprived defendant of a fair trial and entitle him to a new one. This is especially true because the argument is exactly the one condemned by *Deloach.*

It is true that trial counsel did not object to these challenged comments, but this court can reverse a conviction on the basis of remarks to which there is no objection, if their prejudicial effect could not have been cured by a timely instruction. *People v Biggs,* 202 Mich App 450, 460 (1993); *People v Duncan,* 402 Mich 1, 15-17 (1977). No instruction could have cured the prejudicial impact of the prosecutor's misconduct here in a high profile emotional case.

Trial counsel provided ineffective assistance by not objecting

If this court deems the issue forfeited because trial counsel did not object to the arguments, then counsel was ineffective in failing to object to these prejudicial comments. A defendant's right to effective assistance of counsel justifies reversal of an otherwise valid conviction where he shows that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant as to deprive him of a fair trial." *People v Pickens,* 446 Mich 278 (1994).

The record does not establish that it was defense counsel's strategy to fail to object to the highly prejudicial commentary. Had proper objections been made, and the jury been advised to disregard the offending commentary, defendant would have had a reasonably likely chance of acquittal.

Because the record is clear, and there is no possible trial strategy to justify trial counsel's failure to move for a mistrial, review is possible without an evidentiary hearing. *People v Cicotte,* 133 Mich App 630 (1984); *People v Johnson,* 124 Mich App 80; (1983); *People v Davis,* 102 Mich App 403; (1980); *People v Means (On Remand),* 97 Mich App 641, 645 (1980). If this court feels an additional record needs to be made, defendant moves for a remand under the authority of *People v Ginther,* 390 Mich 436 (1973). Defendant is entitled to a new trial.

SUMMARY AND RELIEF

Defendant-Appellant RANDY R. SMITH respectfully requests that this Honorable Court grant his application for cross-appeal or order other appropriate relief, such as peremptory reversal of his convictions and sentences, remand to the Court of Appeals with instructions to consider the evidence sufficiency issue, or hold this application in abeyance pending its decision in Drohan.

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